LIBRARY
ME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 29 1969
JOHN F. DAVIS, CLERK

No. 1007

# In the Supreme Court of the United States

OCTOBER TERM, 1969

MARVIN J. MORSE,
*Petitioners,*

vs.

D. A. HINDMAN, et al,
*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND MOTION FOR LEAVE TO FILE.

## Petition

MARVIN JAMES MORSE
980 Barkley Ct.
Pinole, California
*Pro-se Petitioner*

## INDEX


| | Page |
|---|---|
| Citations to Opinions | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 8 |
| 1. The order of the Court below conflicts with the theory and principle of decisions of this Court as to the proper application of rule 1292 (a) (1) Federal Rules of Appellate Procedure | 8 |
| 2. The decision below conflicts with decisions of other Courts of Appeal as to the proper interpretation of Rule 58 (2) Federal Rules of Civil Procedure | 10 |
| 3. The finding of the Court of Appeals that the State Courts of Kansas can litigate title o reatl property over which the Federal Courts are exercising prior jurisdiction is in conflict with the theory and decisions of this Court and is also in conflict with decsions of the highest Court of the State of Kansas | 11 |
| Conclusion | 13 |


## APPENDIX


| | |
|---|---|
| Order (denying Motion to Rehear Injunction) | 1 |
| Order Granting Stay | 3 |
| Judgment Circuit Court Denying Appeal | 8 |
| Excerpts From Docet Sheets | 11 |

## CITATIONS


| Cases | Pages |
|---|---|
| Baltimore Cont. Inc. v. Royal Ins. Co., 337 U.S. 254 | 9 |
| Bridgeport Mach. Co. v. Aurthur A. Beard, 135 Kan. 711, 11 P2d 990 | 12 |
| Burke v. Comm. of Int. Revenue, 301 F 2d 903 | 10 |
| Burnes v. Richardson, 308 U.S. 73 | 10 |
| Cline v. Burke Const. Co., 260 U.S. 226 | 11 |
| Covel V. Heyman, 111 U.S. 176 | 12 |
| Enlow v. N.Y. Life Ins. Co., 293 U.S. 379 | 9 |
| Gibbs v. Bates, 234 S.W. 175, 150 Ark. 344 | 9 |
| Graves v. Nat. Mut. Ins. Co., 164 Kan. 267, 188 P2d 945 | 11 |
| Hoad v. Denkla, 357 U.S. 235 | 5, 12 |
| City of Huchinson v. Huchinson Gas Co., 125 Kan. 346, 264 P.68 | 12 |
| Morse v. Hindman, Case No. 1031, October Term, 1968 | 7 |
| Pure Oil Co. v. Boyle, 370 U.S. F2d 121 | 10 |
| Shaefer v. Miller, 156 Kan. 768, 137 P2d 156 | 12 |
| United States v. Mark 230 U.S. 531 | 10 |
| Williams v. Payne, 150 Kan. 462, 94 P2d 341 | 11 |


### Statutes


| Constitutional and Federal Statutes | |
|---|---|
| Rule 4 F.R.A.P. | 3 |
| Rule 58 (2) Fed. R. Civ. P. | 3, 10 |
| Rule 60 (b) (4) Fed. Rule Civ. P. | 3 |
| Title 28 USC 1292 (a) (1) | 8 |
| Title 28 USC 1254 (1) | 3 |
| Title 28 USC 1983 | 3 |
| Amendment XIV, Section 1 of the Constitution of the United States | 3 |
| TICLE 28 USC 1651 | 2 |
| Kansas Statutes | |
| K.S.A. 60-1001 (a) (c) | 8 |

# In the Supreme Court of the United States

OCTOBER TERM, 1969

MARVIN J. MORSE,
*Petitioners,*

vs.

D. A. HINDMAN, et al,
*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## MOTION

Now comes the petitioner and respectfully moves this Court for leave to file the annexed petition for writ of certiorari under Section 1651 of Title 28, United States Code, directed to the United States Court of Appeals for the Tenth Circuit to review an order of that Court entered on September 17, 1969, dismissing petitioner's appeal from the United States District Court for the District of Kansas and for such other and further relief as may be just in the premises.

MARVIN J. MORSE
Pro se petitioner
980 Barkley Ct.,
Pinole, Calif.

# In the Supreme Court of the United States

OCTOBER TERM, 1969

MARVIN J. MORSE,
*Petitioners,*

vs.

D. A. HINDMAN, et al,
*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## Petition

The pro se petitioner, Marvin J. Morse,[1] prays a writ of certiorari issue to review the judgment and opinion

1. The additional respondents hereinafter mentioned in this petition for certiorari and against whom petitioner is asserting adverse claims to real property are: Pauline Hindman; Charley A. Lynd; Elida Lynd; Tomlinson-Kathol, Inc.; William T. Kemper; Ray H. Quackenbush; Eugene Crabtree; Frank E. Hedrick; Theodore Carter; Jim Donham; E. Davis Hickman; Jessie I. Wilcoxen; Mobil Pipeline Company; Producers Gas Equities, Inc.; Warren E. Tomlinson; Gerold J. Kathol; Oread Oil Company, Inc.; Joe Hickman; Jones, Shelburne and Former, Inc.; Barton Oil Company; Charles W. Aikens, James W. Owens; Russel Cobb, Jr.; Lydea E. Kearns.
The additional parties plaintiff in the Federal Court asserting rights as heirs of testator but not parties to this petition are: Margaret Christensen; Bernadine Scott; Harold A. Morse; Ralph L. Morse; Donald E. Morse; E. Rhaecilla Hansen; Catherine M. Ransom; Shirley Y. Hendersen; Anna Alley; Barbara Hillman; Elida Merritt; Laura Merritt; Francis Gfeller; and Myron Gfeller as Conservator of the Estate of Mary Catherine Shepard, deceased.

Of the United States Court of Appeals for the Tenth Circuit entered herein on September 17, 1969.

## CITATIONS TO OPINIONS

The opinion and judgment of the Court of Appeals have not been published but appear in the appendix hereto at pages A.8 and 11. The opinions and orders of the District Court upon which the appeal is based appear in the Appendix at Pages A.1. to 7.

## JURISDICTION

The Circuit Court order dismissing the appeal was entered on September 17, 1969, at 0050 hours (1250 AM) on December 17, 1969 a telegramed motion for additional time was received at the office of the Clerk of the United States Supreme Court which was granted that day extending the time to file to and including December 26, 1969 without prejudice as to whether the motion was timely. If timely the court presumably has jurisdiction under 28 USC 1254(1). However, the Courts jurisdiction is also invoked under 28 USC 1651, see House v. Mayo 324 US 42; Hicks v. Dist of Columbia 382 US 252.

## QUESTIONS PRESENTED

1. Whether under 28 U.S.C. 1292(a)(1), an order by a United States District Court staying a common law suit in ejectment pending a final determination of a State Court equitable quiet title action (initiated by defendants after having pleaded in Federal Court) operates as an interlocutory injunction against plaintiffs and is therefore appealable.

2. Whether under rule 58(2) Federal Rules of Civil Procedure, the ruling made by the Court from the bench, followed by the Clerk making a minute entry in the docket sheets, constitutes entry of judgment and

starts the running of statutory period of the time for the filing of notice of appeal, or does the filing by the Court at a later date, of a separate document, containing thereon the judgment of the Court start the running of time to appeal?

3. Whether the Courts of the State of Kansas can acquire jurisdiction over real property by the filing therein of a suit to quiet title by one who is a defendant, and against parties who are plaintiffs, in a Federal Court suit in ejectment disputing title to the same property.

## STATUTES INVOLVED

FEDERAL STATUTES

Rule 4(a) F.R.A.P.
Rule 58(2) Fed. R. Civ. P.
Rule 60(b) (4)
Title 28 U.S.C. 1292(a) (1)
Title 28 U.S.C. 1254(1)
Title 28 U.S.C. 1983
Amendment XIV, Section 1 of the Constitution of the United States.

STATE STATUTES

K.S.A. 60-1001-Ejectment

## STATEMENT OF THE CASE

The official style and title of this case is *Marvin J. Morse, plaintiff-appellant, and Mary Catherine Shepard, et al., plaintiffs v. D. A. Hindman, et al., defendant-appellants, Case No. 20-69 in the United States Court of Appeals for the Tenth Circuit.*

The jurisdiction of the Federal District Court was invoked because of diversity of citizenship, plaintiffs Catherine Shepard and Margaret Christensen being citizens of Oregon and Utah respectively and defendants

being citizens of Kansas, Missouri, California, and one Texas corporation; and, because the jurisdictional amount exists.

Briefly stated, on March 3, 1966, two plaintiffs, Shepard and Christensen filed a class action in the United States District Court for the District of Kansas (R.7) on behalf of themselves and all others similarly situated. The answer of defendants (R. 17) contained five special defences, one of which challenged the plaintiffs' right to maintain a class action. On October 21, 1969, the District Court entered an order upholding the special defence by finding that:

> "The Court cannot under the circumstances say that the class is so numerous that the joinder of all the members is impracticable, particularly when plaintiffs may individually prosecute this action for the protection or recovery of their alleged interests or rights in the real estate involved.'

and therein granted plaintiffs leave to amend the petition for themselves individually. (R. 49).

On October 28, 1966, defendants Hindman and Lynd instituted suit in the (State) Rooks County District Court against all of the remaindermen consisting of the class referred to in the original complaint in Federal Court.

On November 1, 1966, the plaintiffs filed their amended complaint, since that date every person claiming an interest in the property and whose claim was of record at the start of the litigation, has been properly joined as party plaintiff or defendant by lawful order of the Court in the Federal proceedings. However, of the some twenty parties defendant in the Federal Court proceedings only two, Hindman and Lynd, are parties to the State Court proceedings.

Plaintiffs in the Federal Court are asserting title in

fee-simple and immediate rights of possession to described real property situated in Rooks County, Kansas, as beneficiaries of a testamentary trust, and seek to eject defendants. Charley A. Lynd is and has been in continuous possession of the surface estate under a conveyance executed by the life-tenant-trustee, George W. Atherton and his wife on February 11, 1944, to which he purports to have quieted title thereto on April 12, 1944, in Rooks County District Court Case *No. 7807, Lynd v. Hillman, et al.* Two other defendants claim pipeline easements under conveyances executed by Charley A. Lynd and wife, and all other defendants claim interest in producing oil leases executed by Charley A. Lynd and wife, D. A. Hindman and wife, and George W. Atherton and wife.

The Federal Court denied applications of plaintiffs to enjoin the State Court proceedings (R. 48 & 146). Trial therein was had and on September 3, 1968 the State District Court entered a judgment purporting to quiet title to the disputed property in Charley A. Lynd, the appeal therefrom was perfected, the record and appellants' opening briefs are on file in the Kansas Supreme Court, awaiting further action.

In the Federal Court the defendant Mobile Pipeline Co. filed a motion for summary judgment (R. 161) supported by certified copies of the 1944 State quiet title judgment (7807 supra) (R. 166). This petitioner filed an answering brief pointing out that the proceedings defendant relied on made the quieting of title to the property dependent on a favorable judicial construction of the Will under which the plaintiffs assert title and that the judgment therein is void on its face for failure to get jurisdiction of all of the indispensable parties in a suit to construe a will, to wit: George W. Atherton, the life-tenant (see *Hansen v. Denkla, 357 US 235*), and

for numerous other defects, and thereafter filed a motion for summary judgment against all defendants. Both motions were heard together and on July 3, 1968, the Federal District Court entered separate orders denying both motions.

The Federal Court case was placed on the September 9, 1968 Pre-Trial Calendar and on that day the Court heard oral arguments on plaintiffs' motion to vacate the order denying an injunction against the State Court proceedings and for relief thereunder and defendants' motion to stay the Federal Court proceedings pending a final determination of the judgment in State Court. The Court announced its ruling from the bench denying plaintiffs' motion to enjoin the State Court proceedings and the Clerk entered the ruling in the Docket Sheets (R. 367, entry 185). Thereupon the defendants offered in evidence exemplified copies of the purported Findings of Fact and purported Judgment of the State District Court in support of their motion to stay.

On September 25, 1968, the Federal Court filed a written order (R. 367, entry 191), denying plaintiffs' motion heard and ruled on from the bench on September 9, 1968 (A.1) and on October 11, 1968 entered its Order Granting Stay of the Federal Court proceedings (A-3).

Notice of Appeal was filed by plaintiff on October 25, 1968, seeking a general review of "all adverse rulings" of the Federal District Court and specific appellate review of:

1. All orders refusing to enjoin the State Court proceedings.
2. The Order Granting Stay of the Federal Court proceedings.
3. The order denying plaintiffs' motion for summary judgment.

The defendant-appellants promptly filed motions to dismiss the appeal; on February 10, 1969, petition for certiorari in *Morse v. Hindman, Case No. 1031 October Term, 1968* (supra) was filed, *certiorari denied on April 1, 1969, leave to file petition for rehearing denied May 17, 1969,* and on September 17, 1969, the Court of Appeals for the Tenth Circuit filed its order dismissing petitioner's appeal on which this petition is founded.

The order of the Court of Appeals denying the Appeal is based on the Court's finding that:

1. The notice of appeal is timely only as to the order of October 11, 1968 granting a stay of the Federal Court proceedings; however, though timely, the Court holds that the order is not appealable for the stated reason that "the relief sought is principally equitable in nature; a quiet title judgment, on accounting, and an imposition of a trust upon certain funds. The first prerequisite for entertaining the appeal from the stay order is entirely lacking, i.e., that the action stayed be essentially an action at law."

2. The notice of appeal is not timely as to the order filed by the Court on September 25, 1968, for the reason that the minute entry made by the Clerk in the docket sheets, when the Court announced from the bench that the motion was denied, constituted entry of judgment and the time to appeal began to run from that date.

3. The notice of appeal is untimely as to all other orders and "we may not consider them".

## REASONS FOR GRANTING THE WRIT

### 1. THE ORDER OF THE COURT BELOW CONFLICTS WITH THE THEORY AND PRINCIPLE OF DECISIONS OF THIS COURT AS TO THE PROPER APPLICATION OF RULE 1292 (a) (1) FEDERAL RULES OF APPELLATE PROCEDURE.

The Tenth Circuit Court of Appeals adopted appellee's contention that petitioner's claim is "principally equitable in nature" and on this interpretation denied the appeal for the stated reason that only actions that are "principally a law" are appealable when stayed by the Federal District Court pending the outcome of State Court proceedings.

The statutes of Kansas on ejectment read:

> *K.S.A.60-1001.* ACTIONS FOR POSSESSION; EJECTMENT. (a) *PETITION.* In any action to recover possession of real property, including an oil or gas lease or mineral interest, it shall be sufficient if the petition state that the petitioner has a legal or equitable interest therein and the right of possession.
>
> (c) *JUDGMENT; WHEN PLAINTIFF PREVAILS.* If plaintiff prevails the judgment shall be for possession and damages for loss of rents and profits, if any, and execution to enforce the same shall be issued to the sheriff by the clerk at the written request of the party entitled thereto.

In plaintiffs' complaint we allege legal title to the real property as beneficiaries of a testamentary trust and seek damages for waste to the inheritance caused by unauthorized production of oil from the property. Defendants are in possession of the land and deny the legal estate and right to possession of plaintiffs. Defendants'

title originated under a conveyance from the life-tenant named in the same will under which plaintiffs claim title. Defendants further allege title has been established by adverse possession and by a 1944 quiet title judgment, which plaintiffs allege is void on its face.

The position adopted by the Court of Appeals that plaintiffs' form of action is an equitable quiet title action is a legal impossibility, especially under the old form of pleading, for, as was said in *Gibbs v. Bates, 234 S.W. 175, 150 Ark. 344:*

> "Equity jurisdiction to quiet title independent of statute can only be invoked by a plaintiff in possession holding the legal title. The reason is where the title is a purely legal one and someone else is in possession, the remedy at law is plain, adequate and complete, and an action of ejectment cannot be maintained under the guise of a bill in chancery. In such a case the party in possession has a constitutional right to a trial by jury. ... The plaintiff claiming under legal title and defendant being in possession, the plaintiff had a full and complete remedy at law, and chancery had no jurisdiction in the premises."

Thus, with defendants in possession and plaintiff asserting legal title, we could not file suit in what was once the equity side of the court, and the reasons given by the Court of Appeals for denying the appeal is in conflict with the decisions of this court in *Enlow v. New York Life Ins. Co., 293 U.S. 379,* and reaffirmed in *Baltimore Contractors, Inc. v. Royal Ins. Co., 337 U.S. 254 (1949),* wherein this court held that an action staying a proceeding *at law* in Federal Court while a State court proceeds with an equitable proceeding, acts as an injunction against the plaintiffs from which an appeal will lie.

## 2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF RULE 58(2) FEDERAL RULES OF CIVIL PROCEDURE.

The finding by the Court of Appeals that under Rule 4(a) F.R.A.P. the entry made on the civil docket by the Clerk at the time the Court announced its ruling from the bench constitutes entry of judgment fails to take into consideration all of the statutory provisions affecting entry of judgment.

As stated by the Honorable Judge Thornberry of the Fifth Circuit Court of Appeals[2] in *Pure Oil Company v. Boyle, 370 F. 2d 121, 122:*

> "Since July 1, 1963, rule 58 Fed. R. Civ. P. has required that every judgment shall be set forth on a separate document."

and, to paraphrase the ruling therein, as it applies to this case, "Nothing was done by the Court on September 9, 1968, which can be said to constitute a judgment. The only act on the part of the Court was oral, and the only written evidence of such action was the minute entry by the Clerk. . . . The only document which can constitute judgment for the purpose of appeal is the formal order signed and filed by the Court on September 25, 1968", and notice of appeal was filed within the next 30 days.

Defendants would argue that the order of September 25, 1968, was an order denying a rehearing of an earlier order denying an injunction and that the time for filing

---

[2]See also: *Burke v. Comm. of Int. Revenue, 1st Cir. 301 F. 2d 803; Burns v. Richardson, 308 U.S. 73* (fn. 11, pg. 83); *United States v. Hark, 320 U.S. 531.*

an appeal or motion for rehearing had run, thus the notice of appeal is not timely. The answer to that is that the appeal is well founded on the stay order (supra) and the Appellate Court had jurisdiction on apepal to review all orders of the lower court.

3. THE FINDING OF THE COURT OF APPEALS THAT THE STATE COURTS OF KANSAS CAN LITIGATE TITLE TO REAL PROPERTY OVER WHICH THE FEDERAL COURTS ARE EXERCISING PRIOR JURISDICTION IS IN CONFLICT WITH THE THEORY AND DECISIONS OF THIS COURT AND IS ALSO IN CONFLICT WITH DECISIONS OF THE HIGHEST COURT OF THE STATE OF KANSAS.

In *Cline v. Burke Const. Co., 260 U.S. 226,* this Court set out the principle of comity, directing that Courts of co-ordinate jurisdiction were to avoid conflict by avoiding interference with the process of each other. However, in the courts of the State of Kansas this principle is not followed; in *Graves v. Nat. Mut. Ins. Co., 164 Kan. 267, 188 P. 2d. 945,* the Kansas Supreme Court took notice of the distinction made by this Court between *in rem* actions where the question of jurisdiction over the *rem* dictated the use of injunctions against courts of concurrent jurisdiction, and *in personam* actions where multiple litigation was preferable to conflict between the Courts, and made the observation that the decision in *Burke* (supra) applied to Federal Courts only, and therein directed courts under its jurisdiction to issue injunctions against courts of secondary jurisdiction hearing the same argument between the same parties whether the actions are *in rem* or *in personam.*

In *Williams v. Payne, 150 Kan. 462, 94 P. 2d 341,* the Kansas Supreme Court directed a Kansas district court

to issue an injunction enjoining plaintiffs from prosecuting an action in the Missouri State Courts. Indeed, the decisions of the Kansas Supreme Court are universal that the court first acquiring jurisdiction over either an *in personam* or *in rem* action retains jurisdiction to the exclusion of another court which asks or seeks to assume it.[3]

Under the mandates of this Court in *Burke* (supra) and *Covel v. Heyman, 111 U.S. 176*, and cases cited therein, the Courts of the United States are directed to protect their jurisdiction in *in rem* proceedings; this, both the District Court and the Appellate Court have refused to do.

Under the decision in *Hansen v. Denkla 357 U.S. 235*, this Court, in effect, directed that when the highest court of a state consistently enforced a rule concerning its jurisdiction, that rule is to be applied evenly in all decisions within that jurisdiction; thus when the Courts of the United Staets took jurisdiction of this *in rem* action, those Courts having first acquired jurisdiction, should have properly held and retained exclusive jurisdiction over this action against the Courts of Kansas, even to the extent of enjoining the Kansas State Court proceedings.

---

[3]See also: *Shaefer v. Milner, 156 Kan. 769, 137 P. 2d 156; Bridgeport Mach. Co. v. Arthur A. Beard Co., Inc., 135 Kan. 711, 11 P. 2d 990; Hoad v. Home State Bank, 176 Kan. 625, 272 P. 2d 1054; City of Hutchinson v. Hutchinson Gas Co., 125 Kan. 346, 264 P. 68.*

## CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

MARVIN J. MORSE

*Pro se petitioner*

980 Barkley Court

Pinole, California 94564

*In the United States District Court*
*for the District of Kansas*

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
*Plaintiffs,*

vs.

D. A. HINDMAN, et al.,
*Defendants.*

ORDER

On this 9th day of September, 1968, this matter came on for hearing before the Court,

First, upon the motion of plaintiff, Marvin J. Morse, to vacate the order of this Court entered March 8, 1968, refusing to enjoin the parties from proceeding in an action then pending before the Rooks County, Kansas District Court;

Second, upon the motion of defendants, D. A. Hindman and Charley A. Lynd, to stay proceedings in this Court pending the outcome of the action in the Rooks County, Kansas District Court.

Thereupon, the Court, after hearing arguments and statements of counsel and upon being fully advised in the premises, finds that plaintiff's motion to vacate and set aside the order of this Court entered March 8, 1968, should be denied.

It is so ordered.

Thereupon, the Court considered the motion of defendants, Hindman and Lynd, to stay further proceedings between the parties in this Court, and the Court, after fully considering the evidence submitted and the arguments and

statements of the parties and the counsel, finds that such motion should be taken under advisement, that defendants should be granted ten days to file a brief in support of their motion, and that plaintiff should be granted ten days' time thereafter within which to file reply briefs.

It is so ordered.

/s/ GEORGE TEMPLAR
*United States District Judge*

Filed September 25, 1968

*In the United States District Court*
*for the District of Kansas*

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
*Plaintiffs,*

vs.

D. A. HINDMAN, et al.,
*Defendants.*

## ORDER GRANTING STAY

This action was first initiated in this Court when plaintiffs Mary Catherine Shepard and Margaret Christensen filed on March 3, 1966, a class action on behalf of themselves and other remaindermen under the provisions of the will of James E. Atherton, deceased, as a class. The action was brought to establish the rights of plaintiffs in described real estate in Rooks County, Kansas; to set aside deeds conveying interest in the property to defendants Hindman and George W. Atherton and Charley Lynd; declaring a quiet title judgment rendered in case number 7807 by Rooks County, Kansas District Court to be void; setting aside deed from Margaret Christensen to George W. Atherton; and praying money damages, actual and punitive, against defendants Lynd and Hindman; and also praying ejectment of oil and gas lessees and others claiming an interest in the property.

Defendants challenge the right of plaintiffs to maintain the suit as a class action and the Court on October 21, 1966, sustained defendants' special defense that members of the class were not sufficiently numerous to support the maintenance of a class action, but the Court, at that time, granted leave to plaintiffs to file an amended complaint

for themselves individually. On November 1, 1966, an amended complaint was filed by the same plaintiffs, as individuals, seeking substantially the same relief originally prayed for.

In the meantime, defendants Hindman and Lynd had instituted an action in the District Court of Rooks County, Kansas against Mary Catherine Shepard and other persons claiming an interest in the same real property. The determination of the rights and interests of the respective parties in that real estate is the basis of plaintiffs' suit in this Court. On plaintiffs' application, numerous holders of mineral interests in the land were made defendants in this Court and demands for an accounting were sought from each of such defendants, together with a prayer that they be excluded from any interest in the property about which the litigation is involved.

This Court has denied applications of plaintiffs to enjoin defendants from proceeding with the quiet title action in the Rooks County State Court. During the pendency of this action, plaintiff Mary Catherine Shepard died, and the action has been revived in the names of her successors in interest.

The case was placed on the September 9, 1968 Pre-Trial Calendar of the Court, and prior to that time, plaintiffs on September 3, 1968, filed a motion again seeking to enjoin defendants Hindman and Lynd from proceeding in the state court with the action they had instituted there and requesting this Court to vacate the order it had entered denying an injunction to enjoin parties from proceeding with the action in the state court. This motion the Court denied.

On September 4, 1968, defendants filed a motion to stay proceedings in this Court and offered in support of the motion a certified copy of a judgment supported by duly

certified copies of Findings of Fact and Conclusions of Law entered by the District Court of Rooks County, Kansas on September 3, 1968, purporting to quiet the title of the defendants here against the plaintiffs to the described real estate, the subject of the litigation before this Court.

The Court heard this motion on September 9, 1968, and received in evidence certified copies of the Findings and Conclusions and the Judgment entered September 3, 1968 by the Rooks County State Court.

It appears from the evidence submitted that the state court did render a judgment as claimed by Hindman and Lynd quieting their title to the land against plaintiffs here and that the judgment is final. The adjudication of the state court of the issue of ownership in the real estate here involved is determinative of the rights of all the parties to that property. It was said in the case of *Mandeville v. Cantebury,* 318 U.S. 47, 49:

> "But where the judgment sought is strictly in personam for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other."

Again, in *Ballantine Books, Inc. v. Capital Distributing Co.,* 302 F.2d 17 (2nd Cir.), that court set forth the applicable rules as follows, p. 19:

> "The well established rule is that a federal court is not required to abate the normal in personam action on a plea of a pending action in a state court. . . . Had this case been initiated as a civil action rather than by arbitration, it would have been a simple contract action, with none of the in rem characteristics which required the application of a different rule in such

> cases. . . . In such cases, it is within the discretionary power of the district court to stay its proceedings pending the completion of state proceedings."

And, in *Princess Lida v. Thompson*, 305 U.S. 456, the following principle was stated:

> "Where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other."
>
> "But if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other."

This principle was sustained in the Tenth Circuit by the case of *Brinkley v. Hassig, et al.*, 83 F.2d 351.

There is another aspect of the case to which reference should be made. A judgment rendered by a state court of competent jurisdiction is entitled to full faith and credit in all federal courts and bars an action in a federal court on the same cause between the same parties. A state court judgment, operating as a merger and extinguishment of the original claim or demand, will bar an action in a federal court on the same cause of action between the same parties or their privies. If the causes of action are substantially the same, a difference in the relief sought will not prevent the judgment in the state court from operating as an estoppel in the federal court. The judgment of the state court will be conclusive as to all points and questions actually put in issue and decided in the action in the state court. See 50 C.J.S., *Judgments*, § 900, and at § 899 of the same treatise, we find the general statement of applicable law that the principle of res judicata is applied as between

federal and state courts; and where suits on the same cause of action are pending simultaneously in a state court and in a federal court, a final judgment entered in either court will be binding and conclusive in the other, regardless of which suit was first commenced.

Presumably the judgment rendered by the Rooks County District Court, excluding plaintiffs here from any interest in the property involved, is a valid and enforceable judgment. If it is not vacated or reversed, the causes of action in the federal and state courts being substantially the same, the judgment will be conclusive on all points and questions actually put in issue and decided in the action in the state court as between the parties and their privies. See cases cited in 50 C.J.S., *Judgments*, § 900, p. 522.

One of the plaintiffs, Marvin J. Morse, has announced to this Court that a new trial is being sought from the judgment rendered against him and the other plaintiffs by the Rooks County State Court, and if the motion is overruled, that an appeal will be taken by them to the Kansas Supreme Court. Under such circumstances, it is the view of this Court that a stay of further proceedings should be granted as requested by defendants Hindman and Lynd until the motion for a new trial in the Rooks County State Court is determined, and if denied, until the contemplated appeal is heard and determined by the Kansas Supreme Court in that case. Thereafter, the Court will consider any further proceeding required by the facts and circumstances as they then appear.

It is by the Court so ordered.

Dated at Topeka, Kansas, this 11th day of October, 1968.

/s/ GEORGE TEMPLAR

*United States District Judge*

Filed Oct. 11, 1968

DO NOT PUBLISH

*Appendix*

*In the United States Court of Appeals*
*Tenth Circuit*

September Term, 1969

| | |
|---|---|
| MARVIN J. MORSE,<br>*Plaintiff-Appellant,*<br>and<br>MARY CATHERINE SHEPARD, et al.,<br>*Plaintiffs,*<br>v.<br>D. A. HINDMAN, et al.,<br>*Defendants-Appellees.* | No. 20-69 |

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D. C. T-3987)

George B. Powers and Benjamin C. Langel filed a motion to dismiss appeal for defendants-appellees Tomlinson-Kathol, et al.

Richard Jones filed a motion to dismiss appeal for defendant-appellee Mobil Pipe Line Company.

Thomas C. Triplett filed a motion to dismiss appeal for defendants-appellees Charley Lynd, Elida Lynd, D. A. Hindman and Pauline Hindman.

Before MURRAH, Chief Judge, and PICKETT, Circuit Judge.

PER CURIAM

Plaintiff seeks to appeal from "each and every adverse finding, ruling, order and decision" entered in this proceeding by the district court. Defendants move to dismiss the appeal on the grounds that the notice of appeal is untimely as to all save one of the orders enumerated therein, and that the remaining order is not appealable.

The most recent order of the district court in this case, that which prompted this appeal, was entered October 11, 1968, staying further proceedings to await the finality of a state court judgment entered September 4, 1968. That judgment determined the title to certain property in Rooks County, Kansas, ownership of which was claimed by plaintiffs in this case, and upon which their other claims for relief depended. The notice of appeal herein was filed October 25, 1968.

We agree that the notice of appeal is timely only as to the stay order of October 11, 1968. Rule 4(a), F.R.A.P., requires that a notice of appeal be filed within thirty days from the date of the judgment or order appealed from. It provides further that a "judgment or order is entered within the meaning of the subdivision when it is entered in the civil docket." The order plaintiff recites as having been made September 25, 1968, was entered in the docket September 9. Assuming solely for argument that that and all earlier orders are final and appealable, the notice is untimely and we may not consider them.

The stay order of October 11 is not itself a final and appealable order. In *Ephraim Freightways, Inc., v. Red Ball Motor Freight, Inc., 376 F. 2d 40 (10th Cir. 1967)*, this court stated:

> "It is apparent that the order denying the motion to stay is not a final decision under 28 U.S.C. Section 1291. Therefore, the order is appealable, if at all, only as an interlocutory order refusing an injunction under 28 U.S.C. Section 1292 (a) (1). . . . It has been made clear in a series of United States Supreme Court decisions that an order staying or refusing to stay proceedings in the United States District Court is appealable as an interlocutory injunction only if the action in which the order was made is essentially an action at law and the stay was sought to permit the prior determination of some related equitable matter. [Citations omitted.]" 376 F. 2d at 41.

Here, as in that case, although plaintiffs claim damages, the relief sought is principally equitable in nature; a quiet title judgment, an accounting, and imposition of a trust upon certain funds. The first prerequisite for entertaining the appeal from the stay order is entirely lacking, i.e., that the action stayed be essentially an action at law. See also *Jackson Brewing Co. v. Clarke, 303 F. 2d 844 (5th Cir. 1962). See Annot., 18 A.L.R. 3rd 400.*

The motions of defendant-appellees are granted and the appeal is dismissed.

Filed September 17, 1969

*Appendix*

*In the United States Court of Appeals*
*Tenth Circuit*

September Term, 1969, September 17, 1969

Before MURRAH, Chief Judge, and PICKETT, Circuit Judge.

| | |
|---|---|
| MARVIN J. MORSE, *Plaintiff-Appellant*, and MARY CATHERINE SHEPARD, et al., *Plaintiffs*, v. D. A. HINDMAN, et al., *Defendants-Appellees.* | No. 20-69 |

Upon consideration of the motions to dismiss it is ordered that motions be and are hereby granted. The appeal is dismissed.

William L. Whittaker
Clerk

By /s/ RUTH H. JACOBSON
Deputy Clerk

| | | |
|---|---|---|
| 184 | Sep 4 | Defts. Lynd, & Hindmans' motion to stay proceedings filed. |
| 185 | Sep 9 | At Topeka, Templar-J: Pltf. Morse's motion to vacate order - denied. Defts' motion to stay proceedings - taken under advisement. |
| 186 | Sep 9 | Memorandum opinion filed in District Court of Rooks County dated August 5, 1968 filed. |
| 187 | Sep 9 | Judgment filed in District Court of Rooks County dated September 3, 1968 filed. |
| 188 | Sep 12 | Letter to Mr. Tom Triplet from Marvin J. Morse filed. |
| 189 | Sep 19 | Defts memorandum of authorities filed. |
| 190 | Sep 23 | Pltf. Marvin J. Morse's motion to enjoin Mobil Oil Company from disbursing funds filed. |
| 191 | Sep 25 | Order denying pltf's motion to vacate and set aside order; motion of defts Hindman and Lynd to stay further proceedings between parties - taken under advisement, defts granted 10 days to file brief in support of their motion, pltf granted 10 days thereafter in which to reply filed and entered. Templar-J. cc to counsel. |
| | Oct 7 | At Topeka, Templar-J: At the call of the calendar, case passed until Friday. |
| 192 | Oct 11 | At Topeka, Templar-J: Pltf Morse's motion to enjoin Mobil Oil Company from distributing funds - Court stays all proceedings. |
| 193 | Oct 11 | Order granting stay until the motion for a new trial in the Rooks County State Court is determined, and if denied, until the contemplated appeal is heard and determined by the Kansas Supreme Court in that case filed and entered. Templar-J. cc to counsel. |
| 194 | Oct 25 | PLAINTIFFS' NOTICE OF APPEAL filed. Copies mailed to: |